No. 478.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

FIDES, A. G.

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

LAWRENCE R. CONDON,
Attorney for Petitioner,
165 Broadway,
New York, N. Y.

LAWRENCE R. CONDON,
ELLEN E. O'NEIL,
of counsel.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

INDEX.

PAGE

STATUTES CITED:

Revenue Act of 1936, c. 690, 49 Stat. 1648:

Sec. 27(h) 3, 4

Sec. 119(a)(2)(B) 3

Sec. 233 3

Sec. 351 ..... 2, 4

Revenue Act of 1937, c. 815, 50 Stat. 813:

Sec. 331 2

Sec. 352(b) 2

MISCELLANEOUS:

Treasury Regulations 94:

Art. 143-1 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

FIDES, A. G.,
Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 478.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

Respondent asserts (Br. 4-5), as a reason for the correctness of the decision below, the fact that, in 1937, the Revenue Act of 1936 was amended so as to exclude "foreign" personal holding companies as defined in the amendment. The question here involved concerns only the 1936 Act. However, since the respondent's assumption that the 1937 amendment "would seem to be virtually decisive against the taxpayer for the year 1936" is erroneous, petitioner deems it necessary to point out that the 1937 amendment did not exempt or exclude the petitioner or any similar corporation from the personal holding company surtax. It excluded only certain foreign corporations,

defined in the amendment, having stockholders constituting a "United States Group".

Petitioner did not, in 1936, 1937 or in any other year, have a United States Group as defined in the amendment. If petitioner was subject to the surtax in 1936, then it was equally subject to the surtax in 1937, regardless of the amendment set forth in Section 352(b). The amendment provides:

> "Section 352(b). Exceptions.—The term 'personal holding company' does not include * * * a foreign personal holding company as defined in Section 331."

Section 331 defines a foreign personal holding company as

> "(a) Any foreign corporation if (1) * * * (2) Stock Ownership Requirement.—At any time during the taxable year more than 50 per centum in value of its outstanding stock is owned, directly or indirectly, by or for not more than five individuals who are citizens or residents of the United States, hereinafter called 'United States Group' ".

An examination of these sections clearly shows that, in 1937, only those foreign corporations having resident or citizen stockholders owning 50 per cent or more of the company's stock were excluded. The petitioner is not such a corporation.

Thus, a proper judicial construction of Section 351 of the 1936 Act is important to petitioner and all corporations similarly situated for the year 1936 and subsequent years.

Respondent states (Br. 5) that, in enacting Section 351, Congress did not intend a general exemption of foreign corporations, since it cannot be assumed that all of the

individual stockholders of a foreign personal holding company will themselves be aliens. Petitioner agrees. The presumption is that all of the individual stockholders of a foreign personal holding company subject to the surtax will *not* be aliens, and petitioner asserts that Congress did not intend, by the use of the words "every corporation" and "five individuals", to embrace all corporations and all individuals everywhere found but only those corporations and individuals properly subject to the taxing jurisdiction of the United States.

Respondent states in a footnote on page 3 of his brief that a dividend paid credit was disallowed petitioner pursuant to Section 233 of the 1936 Act and that petitioner did not question the denial of the credit in the Circuit Court of Appeals. This statement in respondent's brief is misleading. In the court below petitioner questioned the respondent's reason for denial of the credit and pointed out that, under a proper construction of Section 27(h), the respondent had no discretion to allow petitioner a dividend paid credit. Petitioner does not agree with respondent's interpretation of Section 27(h) (Br. 6). As pointed out in petitioner's brief (pp. 17-18), respondent, like the court below, wholly overlooked the provisions of Section 119(a)(2)(B) whereunder the dividend paid by petitioner in 1936 is deemed to have been income to its stockholders from sources without the United States. Assuming that respondent's interpretation of Section 27(h) is proper, even if petitioner's stockholders in that year had been citizens or residents of the United States, the dividend was not of a *kind* that would have been taxable to them. Consequently, the Commissioner had no power to waive the provisions of Section 27(h) by allowing the petitioner a dividend paid credit. Similarly, the

provisions of Article 143-1 of the Regulations show that the dividend was not taxable to petitioner's stockholders.

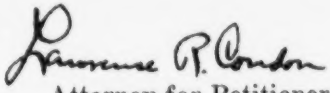
Respondent disposes of petitioner's claim that the imposition of the tax in this case gives extraterritorial effect to the statute by stating (Br. 6) that the same claim could be made with respect to the income tax imposed by Title I. There are certain fundamental differences between the imposition of the surtax in question upon petitioner and the levying of withholding tax on its income from sources within the United States under Title I. The imposition of the latter requires no interference with the corporation's affairs abroad nor does it require the corporation or any of its stockholders to do any acts or take any affirmative steps in order to comply with the law. The obligation to withhold the tax on petitioner's income received here and to make returns thereof is upon withholding agents who are subject to the taxing jurisdiction of the United States. Petitioner, through such agents, has paid withholding taxes in full (R., p. 21). On the other hand, the levy of the surtax provided by Section 351 upon corporations like petitioner (if respondent's interpretation of Section 27(h) is followed) would require foreign corporations to declare dividends periodically at their domicile in foreign countries and, in addition, would require their nonresident alien stockholders to file tax returns with the United States Treasury Department even though such stockholders could in no event be subject to taxation by the United States.

Petitioner submits that requiring these acts under the circumstances here involved is interference with the internal affairs of a foreign corporation and its foreign stock-

holders which was never contemplated by Congress when the statute in question was enacted.

The petition for certiorari should be granted.

Respectfully submitted,



Attorney for Petitioner,
165 Broadway,
New York, N. Y.

LAWRENCE R. CONDON,
ELLEN E. O'NEIL,
Of Counsel.

(7716)